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In The
Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF
NORTH NEW ENGLAND; ET AL.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

BRIEF OF AMICUS CURIAE
of the Horatio R. Storer Foundation, Inc.
In Support of Petitioners

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INTEREST OF AMICUS CURIAE[1]

The Horatio R. Storer Foundation, Inc., is an educational foundation of the National Right to Life Committee, Inc. It is a not-for-profit 501(c)(3) corporation, and its purpose is to further in-depth research and writing and to sponsor legal activities relating to abortion, withholding and withdrawing life-sustaining treatment or care, suicide, assisted suicide, mercy killing, and aspects of human experimentation.

SUMMARY OF THE ARGUMENT

The purpose of this brief is to demonstrate that the Respondents – various abortion providers – lack third party standing to assert the rights of minors in challenging the lack of a health exception, the adequacy of confidentiality provisions, the adequacy of the life exception, and the "chilling effect" on minors of the New Hampshire statute at issue (the "Act"). Since there is no minor plaintiff in this case, the abortions providers' claims against the lack of a health exception and the adequacy of the confidentiality must be dismissed. The abortion providers also fail to assert that they treat or have treated a minor who would be harmed by alleged inadequacy of the Act's life exception, so their third party claims against the Act's death exception and its chilling effect on minors must also be dismissed.

The Act provides a framework for decision making for presumptively incompetent minors before abortion. Since

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[1]**U. S. Supreme Court Rule 37.6**: Amicus Curiae discloses that (1) no counsel for a party authored this brief in whole or in part, and (2) a partial monetary contribution was made toward the preparation or submission of this brief by the Alliance Defense Fund. **U.S. Supreme Court Rule 37.3(a)**: Petitioners and Respondents consented to the filing of this brief. Consent letters have been provided to the Clerk of this Court.

minors are presumed incompetent to make important decisions, the Act provides for parental notice and presumed consultation In the alternative, it provides a court proceeding by which the minor is determined to be sufficiently mature to make abortion decision without notice or, if the minor is deemed immature, then the court determines whether parental notice or the abortion itself is in the minor's best interests.

The abortion providers challenge aspects of this framework on behalf of minor patients, but should not be permitted to do so because they have a potential conflict of interest with mature minors who would choose not to secure an abortion and immature minors for whom abortion is not in their best interests. The abortion providers might properly claim to represent competent women seeking abortions, but here they challenge a statute that is intended to determine whether abortion can or should be sought in the first place. In effect, the abortion providers seek to represent the interests of persons, many of whom would not or should not have an abortion at all, and this they should not be permitted to do.

Moreover, although the providers can claim special expertise and a special interest in performing abortions, they can claim no such expertise in determining whether minors are mature or whether abortion or parental notice is in the minor's best interests. Thus, they should not represent minors in challenging procedures to determine minors' best interests and maturity.

Article III of the U.S. Constitution requires an injury in fact to occur to a litigant in a real and concrete case or controversy, and thus a litigant purporting to represent third parties not before the court must themselves plead and prove an injury by the law complained against. Here, the abortion providers failed to allege that they treat or treated minors who are in need of the blanket

health exception, confidentiality, or life exception that they claim is inadequate, so lack standing to assert minors' interests.

There is a strong presumption against third party standing rooted in Article III, and to warrant third party standing, the litigant must show that enforcement of a statute against him would indirectly result in violation of the third parties' rights. Here, the abortion providers allege no injurious effects on themselves, but only on minors, as the result of a lack of a health exception and can claim no such injury to themselves on account of the confidentiality provisions of the Act, which apply only to the courts.

In addition, there are two specific requirements for third party standing: 1) a close relationship between the litigant and the third party such that the litigant is fully, or very nearly, as effective a proponent of the right at issue as the third party; and 2) that there is no special obstacle to the third party asserting her own interest.

There remains a presumption against third party standing in the abortion context, though the courts have allowed it in some circumstances. U.S. Supreme Court precedent gives no clear answer whether abortion providers can properly represent both mature and immature minors, as the abortion providers here propose, or any minors at all in challenging a statute intended itself to assure minors' best interests or mature competence. Analysis of specific factors governing third party standing reveals, however, that it should be denied here.

First, the abortion providers alleged no injury to themselves as the result of a lack of a blanket exception to the Act for "prompt" health abortions. Moreover, enforcement of the lack of health exception would not lead to the violation of minors' rights when the minors are mature and decide against abortion or immature and the court determines that neither parental notice

nor the abortion itself is in the minors' best interests. Finally, there is no "close relationship" between all minors and the abortion providers when many of them would not or should not receive abortions based on their decisions, whether or not with parental notice, or the decision of the courts.

Second, the abortion providers should be denied third party standing to challenge the adequacy of the life exception because they did not specifically allege that they treat or treated minors in need who would be denied abortion as the result of the exception. Moreover, the life exception amount to a per se best interest determination in the context of the Act, and thus relates to the decision for or against abortion rather than performance of abortion itself. The abortion providers should not represent minors for the purpose of deciding whether abortion is to be decided upon, as opposed to whether it can be performed once decided upon.

Third, the confidentiality provisions of the Act pose no threat to the abortion providers because they are directed solely at courts determining the minors' competence or best interests. Thus, the abortion providers themselves can claim no cognizable injury as the result of these procedures, so they cannot challenge them on behalf of minors.

Fourth, the abortion providers' claim that the minors are chilled by virtue of aspects of the act that they claim are vague and provide inadequate standards of proof is simply a redundant restatement of their own claims against the Act rather than any new claim on behalf of minors. Moreover, it is incoherent to claim that minors' access to abortion is "chilled" by provisions that only chill abortion providers.

Finally, there is no special obstacle to minors representing their own interests in challenging the Act. Numerous cases involving similar challenges to parental notice and consent to

abortion have included been brought by minor plaintiffs. Moreover, the Act itself provides for appointment of a guardian ad litem and appointment of counsel for minors.

ARGUMENT

Amicus Curiae Horatio R. Storer Foundation, Inc., ("Storer") argues that Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. (collectively, the "abortion providers") lack third party standing to challenge the lack of a blanket health exception, the adequacy of the life exception, confidentiality provisions, and a chilling effect of New Hampshire's Act governing abortions performed on minors, 2003 N.H. Laws ch. 173, codified at N.H. Stat. Ann.§§ 132:24 to :28 (the "Act"). That is, the abortion providers lack *jus tertii* standing to assert their patient's rights, as stated in the First Cause of Action of their Complaint, ¶ 31:

> The Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by (a) failing to allow prompt abortions necessary to protect the woman's health; (b) by failing to provide an adequate emergency exception to protect their lives; (c) failing to provide a confidential judicial waiver procedure; (d) chilling the provision of abortions services by failing to give clear notice of what conduct is prohibited by the Acts terms and placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

Because there is no minor plaintiff seeking relief in this case, these claims must thus be dismissed.

I. Third Party Standing Should Be Denied When, As In This Case, the Interests of the Proposed Third Party Are Potentially Adverse to Those Whom the Third Party Would Represent.

The Act provides a judicial framework for deciding whether a minor is a competent decision maker or, if she is not, whether an abortion and parental notification of the abortion are in the minors' best interests. Under the Act, minors are presumed incompetent, and thus unable to make their own decision for abortion, at least without the parental consultation that presumably attends parental notice or, after a court determination that this is not in the minors' best interests, then with judicial consent if the court holds that an abortion is in the minors' best interests. N.H. Rev. Stat. § 132:26 (II).

The abortion providers should not be permitted third party standing to attack this framework as though they adequately or impartially represented the interests of their minor patients. They are professionally competent to perform abortions already decided upon and to decide whether a medical reason exists for performing abortion on their patients, including their minor patients. But they have no special competence to determine whether the minor is mature enough to make a decision for or against an abortion, whether the proposed abortion is generally in the minor's best interests, or whether the degree of confidentiality about the proposed abortion on the minor is appropriate.

That is, abortion providers are certainly competent to determine if some medical reason exists for an abortion. But they have no proper role in deciding for the minor whether such an abortion should in fact be performed – which is the province of the mature minor or a court or parents acting in her best interests – much less whether the child's parents should be notified that it is to be performed.

Storer does not dispute that abortion providers may generally and properly assert *jus tertii* standing for their pregnant patients who have competently chosen to procure abortion. *See, e.g., Singleton v. Wulff,* 428 U.S. 106, 113, 117 (1976). But minors are presumed to be unable to make their own decisions in this regard, thus warranting the very sort of statute that the Act represents and which this Court has sanctioned. *See, e.g., Baird v. Bellotti,* 443 U.S. 622, 812 (1979). In attacking the Act on behalf of minors, the abortion providers thus purport to stand in the place of women who are, in effect, as yet undecided and potentially unable to decide whether an abortion should be even be performed upon them in the first place. They propose to stand in the place of minors to attack a statute that is intended to assure that any abortion is the consequence of the minors' competent choice or in the minors' best interest.

Plainly, third party standing would not be allowed in any other similar circumstance. The federal courts would not allow automobile dealers third party standing on behalf of their potential customers to challenge "lemon laws" or laws intended to assure that the customers are competent to enter into contracts for sales. The courts likewise would not permit physicians to represent their patients in challenging protective laws that require proof of sufficient maturity or court sanction before the same physicians may permanently sterilize them. The courts would not permit lawyers to represent persons declared mentally incompetent in challenging a proceeding to determine whether the persons were competent to hire a lawyer or needed legal representation.

In such cases, those asserting third party standing have a potential conflict of interest with those they purport to represent that disqualifies them from properly representing the rights and interests of the other. The same is true here: The abortion provider purports to represent the rights and interests of persons

to procure abortion who may not even competently choose to or should not have an abortion. Abortion providers represent only one side of the abortion versus childbirth equation that the Act seeks to solve for minors, so they cannot fully or adequately stand in the minors' litigation shoes.

The defect in the claimed third party standing of the abortion providers strikes at the heart of the purpose of Article III of the Constitution. Injuries suffered by minors and abortion providers as the result of the Act may often not be the same. The case or controversy that minors and the abortion provider have against or with the Act may often not be the same. Indeed, the interest of abortion providers in providing abortion without the Act's intervention may often be positively adverse to minors' interest in assuring competent decision making in the minors' best interest that the Act is simultaneously intended to assure.

Abortion providers suffer an injury as the result of the Act if and only if they treat a minor subject to the strictures of the Act that they complain of and: 1) a minor is determined to be immature by virtue of the Act and the abortion is determined not to be in her best interests, 2) the minor is determined to be mature and decides against the abortion even if thought by the others to be in her best interests, or 3) the Act's confidentiality provisions deter seeking abortion because of parental knowledge and input. In other words, the abortion provider suffers an injury by virtue of the very features of the Act intended to confer a benefit on the minor. The provider suffers because it loses the minor as a patient and so loses whatever business she would have brought to the arrangement as a consequence. But the minor is simultaneously deemed to benefit by the Act because her best interests were rightly served by childbirth or because it assures that she has made a mature decision to exercise her fundamental right to bear a child.

Abortion providers may properly represent their minor patients in attacking the Act only if it is assumed that it is *always* in the minor's interest to be aborted – regardless of whether the minor is sufficiently mature to choose abortion and regardless whether this may be in her best interests. This is obviously not the case, so abortion providers have no business whatsoever representing the interests of minors in challenging regulatory aspects of the Act governing determination of the minors' competence, best interests, or confidentiality. They have an inherent potential conflict of interest with those of many of the very minors they purport to represent.

To permit the abortion providers to challenge these aspects of the Act on behalf of minor patients before it is decided that the minors even want or should have confidential abortions puts the substantive cart before the standing horse. It cannot be reconciled with the threshold requirements of Article III of the Constitution.

II. Article III of the U.S. Constitution Dictates That the Abortion Providers Should Be Denied *Jus Tertii* Standing.

The requirement of standing is intended to implement the Framers of the Constitution's concept of "the proper – and properly limited – role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982). Article III's limitation of federal court jurisdiction to actual "cases" and "controversies" justifies the exercise of federal judicial power only "as a necessity in the determination of real, earnest, and vital controversy." *Chicago & Grand Trunk R.R. v. Wellman*, 143 U.S. 339, 345 (1892) (*quoted in Valley Forge*, 454 U.S. at 471). Thus, a plaintiff must allege and later prove an injury that is fairly

traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought. *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472. If the plaintiff cannot do so, then federal courts must dismiss the case as beyond its power to decide when in the litigation the flaw is discovered or arises. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986).

There is no minor plaintiff in this case, and Storer does not dispute that a pregnant minor might properly claim on her own behalf that the Act obstructs her right to secure an abortion. Nor does Storer argue that the abortion providers here might not properly claim a threatened injury by the Act in performing abortions upon minors, assuming they have otherwise properly pleaded and proven that they perform abortions on pregnant minors for reasons the Act forbids. *But see* this Brief at 11-12.

Storer argues that the abortion providers cannot properly claim third party standing to assert the rights and interests of minors as stated in their Complaint, ¶ 31, which involve the lack of a health exception, adequacy of the life exception, adequacy of confidentiality, and supposed chilling effects on the minors because these aspects of the Act affect only the minor and the abortion providers have potentially adverse interests to those of the minor under the Act with regard to them.

That is, only the minor can assert a " real, earnest, and vital controversy" with regard to these aspects of the Act because they relate to the decision whether or not abortion is to be performed in the first place on a presumptively incompetent person, and who may know of this, not to manner of performance of the abortion itself. The abortion providers can claim no real, constitutionally cognizable injury fairly traceable to the Act simply because it forbids them to perform immediate abortions on minors at will whenever they detect a medical reason to do

so, regardless of the minor's competence to consent to the procedure or her best interests.

A. *The General Rule Parties Is That Parties Must Represent Their Own Interests in Federal Litigation.*

Because of Article III's "case and controversy" provision," plaintiffs are typically required to "assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. at 499. As such, there is a presumption against third party standing that requires individuals to represent their own interests that exists in all federal cases: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. at 255; *see also, e.g., Singleton v. Wulff*, 428 U.S. at 113. Underlying this presumption is the recognition that "third parties themselves usually will be the best proponents of their own rights." *Id.* at 114. It is this presumption that a plaintiff must overcome when seeking to assert the rights of non-participating parties.

B. *Third Party Standing Is Allowed In Certain Exceptional Circumstances.*

Although there is a strong presumption against third party standing, it is not absolute. To overcome it, litigants must initially demonstrate that they have standing themselves and have suffered an injury in fact. *Miller v. Albright*, 523 U.S. 420, 447 (1998) (O'Connor, J., concurring) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). In this regard, the abortion providers nowhere allege that they are harmed by the lack of a health exception, but challenge the lack of health exception solely on behalf of minor patients. The confidentiality provisions of the Act nowhere penalizes them, and they claim only that the supposed inadequacy of the life exception harms minors in need of abortion. Complaint, ¶ 27. They claim that minors' access to

abortion is "chilled" because of an inadequate life exception and lack of good faith immunity – but this claim is indistinguishable from the claims they make on their own behalf unrelated to any need for third party standing in the Second Cause of Action of their Complaint, ¶ 32.[2] Thus, it is certain that the abortion providers have asserted Article III standing on their own behalf to attack the Act's lack of a blanket health exception or confidentiality provisions, and at least doubtful that they have alleged sufficient facts sufficient for third party standing to attack the adequacy of the death exception or to claim a separate chilling effect of the Act on minors.

Moreover, litigants may be "allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth*, 422 U.S. at 510. In the present context, this would mean that the injurious effects *on the abortion providers* of the Act's challenged lack of a blanket health exception, the adequacy of its life exception, and the adequacy of its confidentiality provisions must indirectly result in the violation of minors' abortion rights. In sum, the abortion providers must allege and prove that they are injured by the Act *and* that the injury they suffer will result in creating an obstacle to abortion for the minors they would represent, and they have failed to do so.

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[2]"The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they may rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability."

Finally, there are two specific requirements to qualify for third party standing:

> First, we have asked whether the party asserting the right has a "close" relationship with the person who possesses the right. Second, we have considered whether there is a "hindrance" to the possessor's ability to protect his own interests.

Kowalski v. Tesmer, __ U.S. ___, 125 S.Ct. 564, 567 (2004) (*citing Powers v. Ohio*, 499 U.S. at 411); *Albright*, 523 U.S. at 447 (O'Connor, J., concurring).

When considering the first requirement, the Court reviews whether "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114-115. In this regard, the Court determines whether "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* This requirement has been narrowly construed: The relationship between the third party and the litigant cannot simply be like the connection between a vendor and potential vendees, but must be like "the relationship between one who acted to protect the rights of a minority and the minority itself." *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (*cited by Craig v. Boren*, 429 U.S. 190, 216 (1976) (Burger, J., dissenting)).

When considering the second requirement, the Court determines the ability of the third party to assert her own right. *Singleton*, 428 U.S. at 115-116. In this regard, it must be "difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257. Thus, for example, when the Court was faced with an organization bringing suit on behalf of its members to protect those members' names from being divulged, the Court

found that the organization satisfied this requirement because "[to] require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). Likewise, in *Hodel v. Irving*, 481 U.S. 704 (1987), this Court found that plaintiffs had third-party standing to assert the rights of their deceased parents because it was impossible for the parents to assert their own rights.

In the context of abortion, the presumption against third party standing continues to apply, and litigants are generally required to represent only their own interests: "'Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.'" *Singleton*, 428 U.S. at 113 (*quoting Barrows*, 346 U.S. at 255). In abortion litigation, "third parties themselves usually will be the best proponents of their own rights." *Singleton*, 428 U.S. at 114

Nevertheless, third party standing has been granted to abortion providers to represent women seeking abortion. In this case, the Court of Appeals relied on this Court's decisions in *Singleton*, 428 U.S. at 117-18, and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), in support of granting the abortion providers third party standing here. Petition for Writ of Certiorari at App. 5, n. 2.

Singleton, however, involved a suit in which abortion providers sought to represent those seeking public financial assistance to pay the abortion providers for their services. 428 U.S. at 108. The abortion providers were themselves clearly harmed if they were not paid, there was no potential conflict of interests between the providers and the women seeking public assistance, and the case did not involve a challenge to a statute to determine whether the women involved could even consent to abortion in the first place.

The *Danforth* Court did not hold that the plaintiffs in that case had third party standing to represent minors, but rather that they had themselves "assert[ed] a sufficiently direct threat of personal detriment," 428 U.S. at 62, to provide them standing on their own behalf, presumably because the plaintiffs themselves could be penalized under the Missouri statute at issue there for performing abortion on any minor without parental consent.

Moreover, *Danforth* specifically denied physician abortion providers in that case standing to challenge a portion of the Act that related to the wardship of a live-born infant because the provision did not "impose any obligation on them" or otherwise "injure[] them in fact," and they did not have "any interest in the question of who receives custody that is 'sufficiently concrete' to satisfy the 'case or controversy' requirement of a federal court's Art. III jurisdiction." *Id.* at 62 n. 2 (*citing Singleton*, 428 U.S. at 112). The proceedings contemplated by the Act are closely analogous to the custody matter at issue in *Danforth* in that they amount to a hearing for determination whether the minor is sufficiently mature to be deemed in her own custody and control for the purpose of an abortion decision or whether the court or minors' parents will make or assist in making abortion decisions for her. From this perspective, *Danforth* provides clear precedent to the effect that the abortion providers here have no interest at stake in the proceedings to render them eligible to represent minors in challenging their constitutional parameters.

In *Bellotti v. Baird*, 443 U.S. 622 (1979), a minor was present to represent the "class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents." *Baird v. Bellotti*, 393 F. Supp. 847, 850 (Mass. 1975). As this Court noted, "Initially there was some confusion whether the rights of minors who wish abortions without

parental involvement but who lack 'adequate capacity' to give such consent also could be adjudicated in the suit. The District Court ultimately determined that [abortion provider] Dr. Zupnick was entitled to assert the rights of these minors. See *Baird v. Bellotti*, 450 F. Supp. 997, 1001, and n. 6 (Mass. 1978)." *Bellotti*, 443 U.S. at 626-27. However, this Court never specifically addressed the constitutional propriety of this, noting only that it was "apparent from the District Court's opinions" that it considered the constitutionality of the Massachusetts parental consent statute "as applied to all pregnant minors whom might be affected by it," and that the this Court "accept[ed] that the rights of this entire category of minors properly were subject to adjudication." *Id.* at 627 n. 5. Thus, the most that can be said of *Bellotti*, if it represents a meaningful precedent on third party standing of abortion providers to represent minors at all, is only that abortion providers may represent "immature minors." But here, the abortion providers claim to represent *all* minors in the context of this litigation, even those who might properly make their own abortion decisions.

Hodgson v. Minnesota, 497 U.S. 417 (1990), involved a challenge to a statute that required a 48-hour waiting period and notification to both parents before an abortion could be performed on a minor. But "six pregnant minors representing a class of pregnant minors" were among those who brought the case, *id.* at 427, so third party representation of the minors was not at issue. Similarly, in *H.L. v. Matheson*, 450 U.S. 398 (1981), which involved a challenge to a parental notification statute, the plaintiff was herself a pregnant unmarried 15-year-old living with her parents, so third party standing by an abortion provider was not itself directly at issue.[3] Based on *H.L.*, the

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[3]Notably, however, since the minor plaintiff H.L. did not allege or offer evidence that either she or any member of her class was mature or (continued...)

Sixth Circuit court in *Akron Center for Reproductive Health, Inc. v. City of Akron,* 651 F.2d 1198 (6th Cir.1981), stated that the constitutionality of a notification statute as applied to mature minors could not be decided because abortion clinics and a physician were challenging the provision, not a mature minor.[4] *Id.* at 1205-6.

In sum, there is no direct precedent governing whether abortion providers should properly be granted third party standing to represent minors in challenging a law providing procedures to determine whether minors are sufficiently mature to make their own decisions with regard to abortion or whether the decision should be made by a court or in consultation with parents. As Storer will now show, however, the reasoning of the Court's general precedents dictates that third party standing should not be granted to abortion providers in challenging the

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[3](...continued)
emancipated, this Court held that she lacked standing to challenge the Utah statute as being unconstitutional on its face on the ground of overbreadth in that the statute could be construed to apply to all unmarried minor girls, including those who are mature and emancipated. *Id.* at 406. The Court then held that the Utah parental notice law unconstitutional as applied to the minor, H.L. *Id.* at 413.

In purporting to represent all minors in a facial attack on the New Hampshire Act here, the abortion providers similarly fail to specifically allege that they treat both mature and immature minors or that any minor they treat or have treated have encounter the need for a "prompt" health abortion or that the Act's life exception would be inadequate to preserve the life of any minor that they treat or have treated. In this regard, their allegations themselves lack the concrete specificity rooted in a real case or controversy necessary for Article III standing.

[4]The Sixth Circuit's ruling on that provision was not appealed to nor reviewed by this Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

lack of a blanket health exception to the Act or the adequacy of its life exception and confidentiality provisions.

C. *Specific Criteria for Permitting Third Party Standing Are Not Met in this Case.*

1. The Abortion Providers Should Be Denied Third Party Standing to Challenge the Act's Lack of a Blanket Health Exception on Behalf of Minors.

The abortion providers' claim against the Act made on behalf of minor women for "failing to allow prompt abortions necessary to protect the [minor] woman's health," Complaint, ¶ 31(a), fails to satisfy the specialized criteria for *jus tertii* standing for two reasons.

First, the abortion providers fail the threshold requirement that they be allowed standing to litigate the rights of third party minors only "when enforcement of the challenged restriction against the [abortion providers] would result indirectly in the violation of [minors]' rights." *Warth*, 422 U.S. at 510. No doubt, the lack of a blanket health exception would render the abortion providers liable under the Act for performing abortions for "health" reasons on minors without parental notice or securing court authority to do so, thereby depriving some minors of any putative right to a health abortion.

However, performing such abortions on those minors who are too immature to decide for abortion, or for whom abortion is not in their best interests would directly violate these minors' rights to bodily integrity and to carry their children to term. Arguably, the abortion providers might legitimately represent mature minors seeking abortion. But this begs one of the very questions that the Act seeks to answer: Who is a mature minor, when all unemancipated minors are presumed immature without some court determination otherwise? Thus, without such

determinations as the Act itself provides, the Act cannot be said to violate or protect a particular right of any particular minor. So the injury claimed by the abortion proponents lacks the concreteness and specificity necessary to provide them standing.

Second, and more obviously, it cannot be said that there is a "close" relationship between abortion providers and minors such that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 114-15. The right of the minor placed at issue by the Act is not the minor's right to *secure* an abortion once competently decided upon, but the minor's right to *decide* (or have a best interests decision made for her) whether to have an abortion *or* to give birth – and abortion providers are only effective proponents of the former proposition.

That the right claimed on behalf of the minor is a right to a "prompt" abortion for "health" reasons makes no difference. If, as the Act provides, the minor is deemed mature, then she may make a decision whether or not the effect on her health of continued pregnancy is in her own best interests. If she is deemed too immature to make her own decision, then the Act provides that the court will make the decision for her in her best interests – a decision that would surely take into account health consequences. So the Act provides for "health" abortions as a feature of the minor's own decision or the best interests decision of the court.

It is true that the Act does not provide the physician with authority to provide a "prompt" or immediate abortion upon minors without court or parental notice or consent. But the abortion providers' claim in this regard amounts to the naked assertion that minors have a right to immediate abortion without the formal consent of anyone at all, since even the minor herself is legally presumed incapable of consent. That is, their claim

posits a federal constitutional right of implied consent to perform "health" abortion on minors (and, by necessary implication, at least, on adults who have never been competent). Plainly, even if there were such a right, it must be asserted by minors themselves, not by abortion providers who propose to abort them at will any time they detect a colorable health justification to do so. An abortion provider is not, by definition, an impartial or neutral arbiter of minors' capacity to consent to abortion or whether their best interests would necessarily be served by a "prompt" health abortion.

In this regard, it is notable that the abortion providers here do not merely purport to represent minors in securing more expedited proceedings than the Act already provides to determine whether the minor is mature enough to make her own value judgment regarding what health risks, if any, she may wish to bear by continued pregnancy or to evaluate an immature minor's health risks in context of a best interest determination. Instead, relying on *Stenberg v. Carhardt*, 530 U.S. 914, 931 (2000), which was decided in the context of a complete ban on a certain abortion procedure even when a health risk is posed, they seek a *blanket* exemption to the Act. Respondents' Brief in Opposition at 5. They quote *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992), to support striking down the Act for lack of a blanket health exception because "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion . . .if continuing her pregnancy would constitute a threat to her health." Respondents' Brief in Opposition at 5.[5] In effect

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[5]Moreover, the abortion providers evade describing the scope of the definition of "health" that they urge as a blanket exception to the Act. They generally invoke such complications as preeclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous choriamnionitis, and heavy bleeding during pregnancy, Complaint, ¶ 25, (continued...)

they thus claim that the delay effected by the Act to assess minors' maturity or best interests is unconstitutional in the face of a health risk because *any* delay interferes with abortion – a conclusion that simply cannot be reconciled with any other analogous precedent of this Court.[6]

Their theory utterly neglects the threshold question of whether a minor is capable of a competent "choice" to undergo an abortion or, if not, whether it is necessarily in her best interest to do so. Many, if not most, competent women would assume some health risk from continued pregnancy given the choice, and it cannot be assumed that all minors would choose otherwise in assessing their best interests. That the abortion providers simply assume otherwise further demonstrates that they are not effective

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[5](...continued)
though they do not specifically allege that they presently treat or have treated any minor in need of an immediate health or life abortion for any particular such reason. Moreover, there is nothing that prevents use of as broad a definition of health as that employed in *Doe v. Bolton*, 420 U.S. 179, 212 (1973), to include any and "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." If so, then mere emotional distress or minority age itself might justify short-circuiting the Act.

[6]For example, in *Cruzan v. Director*, 497 U.S. 261 (1990), this Court upheld a Missouri scheme that required court assessment to determine whether there was clear and convincing evidence of a presently incompetent person's wish to forego life-sustaining tube feeding or hydration before they might be withheld or withdrawn from that person – thereby necessarily entailing possible considerable delay and possible attendant suffering in effecting any exercise of the fundamental right to refuse unwanted medical treatment. Yet it cannot be cogently argued that the rights and interests at stake in delaying discontinuation of potentially painful and intrusive medical treatment are any less consequential than those at stake delaying any "health" abortion. In either case, delay is justified to properly assess the nature of the decisional right at issue, given the fundamental rights and values at stake whichever choice is ultimately made.

proponents of the right at issue and should thus be denied third party standing to represent minors in this regard.

2. The Abortion Providers Should Be Denied Third Party Standing to Challenge Adequacy of the Act's Life Exception on Behalf of Minors.

The abortion providers also claim that the "Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by .... failing to provide an adequate emergency exception to protect their lives . . . ." Complaint, ¶ 31 (b). The "life" exception of the Act provides that "no notice shall be required under RSA 132:24 if . . . [t]he attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice. . . ." N.H. Rev. Stat. Ann. § 132:26(I)(a).

The "life" exception deems abortion *per se* in the best interests of minors regardless of the minors' maturity when abortion is deemed necessary to prevent death – obviating the need for and short-circuiting the procedures provided by the Act to determine the maturity of the minor or whether the best interests of the immature minor are served by abortion or parental notice.

Nevertheless, the abortion providers ought not be permitted to challenge the adequacy of the life exception on behalf of minors, even if they may certainly challenge it on their own behalf on account of the potential liability it imposes on them (and assuming that they otherwise satisfy standing requirements). The extent to which the Act deems abortion to be always in a minor's best interest notwithstanding maturity because continued pregnancy may pose a threat to life still

relates to the *decision* for or against abortion, rather than to the *performance* of abortion once decided upon. Abortion providers have no necessary interest in the outcome of such a decision.

A mature minor, after all, has the right to decide to risk life in order to carry her child to term and might have a different judgment on the scope of the risk she would assume in order to do so, and hence the "adequacy" of any life exception. But to grant abortion providers the right to challenge the adequacy of the life exception on behalf of the minors would be based on the implicit and unwarranted assumption that minors would always choose abortion as in their best interests when confronted with a risk to life and would always assess the "adequacy" of the life exception in the same way as they do.

Since the State is making the decision for minor women that abortion without parental notice or assessment of maturity is the minor's best interest because of the risk to life posed by continued pregnancy, then "adequacy" of that decision should be challenged by the minors themselves, with whom the ultimate right to abortion decision making belongs. Because there is no minor plaintiff in this case, the abortion providers' cause of action in this regard should thus be dismissed.

3. The Abortion Providers Should Be Denied Third Party Standing to Challenge the Adequacy of the Act's Confidentiality Provisions on Behalf of Their Minor Patients.

The abortion providers next claim that the "Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by . . . failing to provide a confidential judicial waiver procedure . . . ." Complaint, ¶ 31 (c). They should be denied third party standing to challenge the Act's confidentiality provisions because there is no threat of injury to them posed by any lack of confidentiality

in the procedures contemplated by the Act. They thus fail to satisfy the requirement that third party standing be granted only "when enforcement of the challenged restriction against the [abortion providers] would result indirectly in the violation of [minors]' rights," *Warth*, 422 U.S. at 510, because the confidentiality provisions do not apply to the abortion providers.

The confidentiality provisions of the Act are directed solely to the trial and appellate courts of New Hampshire, stating that the "[p]roceedings in the [trial] court under this section shall be confidential," N.H. Rev. Stat. § 132:26 (II)(b), and "[a]n expedited confidential appeal shall be available to any such pregnant minor for whom the court denied an order authorizing an abortion without notification." *Id.* at § 132:26 (II)(c). They cannot be enforced against the abortion providers at all, and thus they cannot possibly indirectly result in any violation of the minors' rights as the result of enforcement against the providers.

The only enforcement provision in the Act provides that "[p]erformance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for civil action by a person wrongfully denied notification." *Id.* at § 132:27. The confidentiality procedures of the Act potentially affect only the minors who seek court review, who are thus the only legitimate complainants against whatever deficiency in them that might be alleged. Because there is no minor plaintiff in this case who seeks relief of the Act's notification requirement, it follows that this cause of action must be dismissed.

4. The Abortion Providers Should Be Denied Third Party Standing to Challenge Any Chilling Effect On Behalf of their Minor Patients.

Finally, the abortion providers claim that the Act deprives minors of their privacy rights by "chilling the provision of

abortion services by failing to give clear notice of what conduct is prohibited by the Act's terms and placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability." Complaint, ¶ 31 (d). This claim cannot relate to the lack of health exception or confidentiality provisions of the Act at all, since there is no language in the Act that applies to the providers with regard to these aspects of the Act.

Indeed, this aspect of the abortion providers' Complaint appears to do no more than to attempt to incorporate their Second Cause of Action claiming injuries to themselves into their First Cause of Action claiming injuries to minors. *See* this Brief at 2 (Complaint, ¶ 31) and 12 n.2 (Complaint, ¶ 32). So this third party claim is unnecessary to the relief sought, which would be fully secured through their Second Cause of Action, and is superfluous.

Moreov r, it is incoherent: The abortion providers may be "chilled" in erforming abortions because aspects of the Act may be unclear or because some standard of proof is inadequate, but minor women are not. Their access to abortion would be limited or obstructed to the extent that abortion providers are "chilled." The abortion providers should thus be denied third party standing to represent minors in this regard.

D. *There Is No Significant Obstacle to Minors Representing Their Own Interests In Challenging the Lack of a Blanket Health Exception or the Adequacy of the Life Exception and Confidentiality Procedures of the Act.*

In addition to the Article III requirements that the abortion providers must themselves have standing to challenge a statute on behalf of another and that they only be "allowed standing to litigate the rights of third parties when enforcement of the

challenged restriction against the litigant would result indirectly in the violation of third parties' rights," *Warth*, 422 U.S. at 510, as well as the prudential consideration of a "close" relationship between litigant and third party, third party standing should only be granted when it is "difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257.

There have been numerous instances in which minors have been parties in challenging aspects of parental notice and consent statutes similar to the Act. *See, e.g., Hodgson v. Minnesota*, 497 U.S. at 427; *H.L. v. Matheson*, 450 U.S. at 340; *Bellotti v. Baird*, 443 U.S. at 627; *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 854 (6th Cir. 1988); *Margaret S. v. Edward*, 794 F.2d 994, 997 (5th Cir. 1986); *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1131 (7th Cir. 1983). There is no reason that minors could not have also sued here.

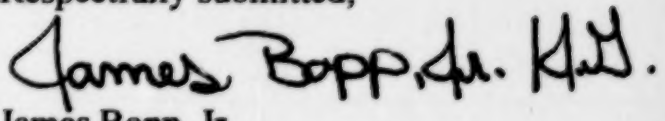
Moreover, the Act itself specifically provides that both a guardian ad litem may be appointed for any minor who is a party to proceedings under the Act and that the "court shall . . . advise her that she has a right to court–appointed counsel, and shall, upon her request, provide her with such counsel." N.H. Rev. Stat. § 132:26 (II)(b). Plainly, therefore, it is not "difficult, if not impossible" for minors to present any particular grievance they may have against the Act "to any court." Third party standing should thus not be provided to the abortion providers on such a basis.

CONCLUSION

On the basis of the foregoing, amicus Horatio R. Storer Foundation, Inc., prays this Court to find that the abortion providers lack third party standing to assert claims on behalf of minors. Their claims relating to the lack of a health exception

in the Act, the Act's confidentiality provisions, the adequacy of the Act's death exception, and the chilling effect of the Act on minors must therefore be dismissed because there is no minor party challenging these aspects of the Act.

Respectfully submitted,



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